

SOUTHERN ENVIRONMENTAL LAW CENTER

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December 28, 2015

VIA FOIAonline (foiaonline.regulations.gov) and U.S. Mail

U.S. Environmental Protection Agency
National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request and Fee Waiver Denial

Dear Sir or Madam:

Under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC"), a 501(c)(3) non-profit organization, requests the following information:

1. All communications from January 2010 to the present between the U.S. Environmental Protection Agency ("EPA") and the Tennessee Department of Environment and Conservation ("TDEC") relating to the Tennessee Valley Authority ("TVA") - Kingston Fossil Plant Solid Waste Disposal Facility, Class II Landfill, Tennessee Permit No. IDL730000211 (the "Peninsula Landfill") and/or any specific cell or phase of the Peninsula Landfill, including Phase 1A, Phase 1B or Phase 2.
2. All communications from January 2010 to the present between EPA and TVA relating to the Peninsula Landfill and/or any specific cell or phase of the Peninsula Landfill, including Phase 1A, Phase 1B or Phase 2.
3. All documents discussing the meaning or interpretation of the following terms used in EPA's rule governing the Disposal of Coal Combustion Residuals from Electric Utilities ("CCR Rule"): new landfill, existing landfill, and lateral expansion.
4. All documents discussing whether the Peninsula Landfill and/or any specific cell or phase of the Peninsula Landfill, including Phase 1A, Phase 1B or Phase 2 is understood by EPA, TDEC and/or TVA to be a "new" or "existing" landfill under the CCR Rule and/or whether any phase of the Kingston Landfill is understood to be a lateral expansion of an existing landfill.

Due to the massive coal ash spill at the Tennessee Valley Authority - Kingston Fossil Plant ("Kingston Plant") on December 22, 2008, we recognize that EPA likely possesses a substantial number of records generally relating to the Kingston Plant and coal ash. To be clear, we are **not** seeking records related to that spill and its subsequent clean-up. Rather, we are only requesting records related to the Peninsula Landfill and any specific cell or phase of the Peninsula Landfill, including Phase 1A, Phase 1B or Phase 2, which obtained a state solid waste permit from TDEC to receive gypsum in 2007, experienced a massive sink-hole ("drop out") in 2010, and obtained a major modification to its state solid waste permit in 2015.

For the purposes of this request, the term "documents" includes all written, printed, recorded or electronic: materials, communications, correspondence, memoranda, notations, copies, diagrams, charts, maps, photographs, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages and mail in the possession or control of the Environmental Protection Agency.

FOIA directs a responding agency to make a "determination" on any request within twenty (20) working days of receipt. *See* 5 U.S.C. § 552(a)(6)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt. 5 U.S.C. § 552(b). Should our requests be denied, we request that you inform us of the grounds for denial and the specific administrative appeal rights which are available. *See* 5 U.S.C. § 552(a)(6)(A)(i).

SELC is requesting photocopies without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of the FOIA should be "liberally construed" in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D.Colo.1994); *Etlinger v. FBI*, 596 F. Supp 867, 872 (D. Mass. 1984). The goal of the statute is to avoid the "roadblocks and technicalities which have been used by various Federal agencies to deny waivers...." *Pederson*, 847 F. Supp. at 855.

SELC is a 501(c)(3) non-profit organization with over 25 years of experience disseminating public information regarding EPA regulatory and operations issues. *See* 5 U.S.C. § 552 (a)(4)(A)(iii). SELC maintains a website that includes both general and topic-specific information regarding the matters with which SELC is involved. Lawyers at SELC are interviewed by the media to explain their work and its significance. SELC's website contains documents generated by SELC for the specific purpose of educating the public on particular issues. SELC also speaks at conferences on particular topics. SELC also assists the public in locating information relating to a particular topic by collecting and posting relevant information, documents, and links to other websites.

The particular topic of this FOIA request concerns the byproducts of coal combustion (collectively, "coal ash"). TVA stores coal ash at the Peninsula Landfill, and the public

information requested by SELC relates to coal ash at that site and to EPA's interpretation of its new CCR Rule more generally. Therefore, a fee waiver is appropriate in this case for the following additional reasons: for many years, SELC has been working on issues related to the environmental impacts of coal ash—namely, enforcing state and federal environmental laws and advocating for policy changes to ensure the safe storage/disposal of coal ash—and SELC has disseminated information to members of the public on this topic. For example, SELC's website includes pages specifically dedicated to informing the public about coal ash;¹ SELC aggregates media reports related to coal ash and provides updates on SELC's coal ash litigation;² SELC publicly shares its policy analysis related to coal ash and³ describes energy companies' efforts to address coal ash storage;⁴ and SELC has used public records to create interactive maps⁵ and maps showing coal ash facilities in relation to other public resources.⁶ In addition, SELC has partnered with other public interest organizations, including the Southern Alliance for Clean Energy, Appalachian Voices, and NC Conservation Network to launch the first-ever comprehensive online tool that allows members of the public to find specific information about coal ash impoundments near them.⁷ This website includes sections like "About Coal Ash," which inform the public about both coal ash and EPA's CCR Rule.⁸ Regarding TVA's Kingston Plant and the Peninsula Landfill, SELC co-authored comments to TDEC in 2014 and 2015 with member-based groups that also communicate with the public: Southern Alliance for Clean Energy, Tennessee Clean Water Network, Statewide Organizing for Community eMpowerment, the Sierra Club, Environmental Integrity Project, and Earthjustice.⁹ The response to this FOIA

¹ E.g., "Coal Ash," available at <https://www.southernenvironment.org/cases-and-projects/coal-waste>.

² E.g., "Court rejects Dominion's motion to dismiss coal ash lawsuit," (November 9, 2015), available at <https://www.southernenvironment.org/news-and-press/news-feed/court-rejects-dominions-motion-to-dismiss-coal-ash-lawsuit>.

³ E.g., "U.S. House bill attempts to wipe out safeguards in EPA coal ash law" (July 22, 2015), available at <https://www.southernenvironment.org/news-and-press/news-feed/u.s.-house-bill-attempts-to-wipe-out-safeguards-in-epa-coal-ash-law>.

⁴ E.g., "Coal Ash: Latest News," available at <https://www.southernenvironment.org/cases-and-projects/coal-waste/more/latest-news>.

⁵ E.g., "Coal Ash Interactive Map," available at <https://www.southernenvironment.org/coal-ash-interactive-map>.

⁶ E.g., "Drinking Water For 1.2 Million People* is Downstream From Gallatin Station," available at https://www.southernenvironment.org/uploads/maps/Map_Gallatin_and_Drinking_Water_Intakes_draft2.pdf.

⁷ E.g., "Southeast Coal Ash Waste," available at <http://www.southeastcoalah.org/>. See also "SELC and Partners Launch New Website Highlighting Southeast's Toxic Coal Ash," available at <https://www.southernenvironment.org/news-and-press/news-feed/selc-and-partners-launch-new-website-highlighting-southeasts-toxic-coal-ash>.

⁸ E.g., "Coal Ash Rules And The EPA" available at http://www.southeastcoalah.org/?page_id=50; see also "What Is Coal Ash?" available at http://www.southeastcoalah.org/?page_id=712 ("On December 19, 2014, nearly six years after the Kingston Disaster, EPA released the Disposal of Coal Combustion Residuals from Electric Utilities final rule otherwise known as the coal ash rule. EPA is now regulating coal ash under the Resource Conservation and Recovery Act (RCRA), but despite the clear risks, the agency declined to classify the toxic substance as "hazardous" under RCRA. This means that states are not required to implement the rule and the federal government is not enforcing the rule—leaving enforcement to the utilities (and other owners) themselves, the states, and via citizen suits. Unfortunately, state standards are both inconsistent and insufficient, and industry lobbyists and certain members of congress are trying to strip EPA of its authority to provide science-based protections to the American people.").

⁹ E.g., <http://www.cleanenergy.org/2014/12/30/kingston-landfill-groups-comments/>;
<https://www.sierraclub.org/sites/www.sierraclub.org/files/sceaauthors/u802/Kingston%20Landfill%20Comments.pdf>.

request can therefore also be shared with these groups who may help communicate the information to the public.

Both TVA and EPA are government actors, and the information requested by SELC is not already available in the public domain to our knowledge.

A fee waiver clearly will benefit the general public through increased notice and understanding of the operations of the government and of potential or proposed major policy incentives. SELC further certifies that disclosure of the information sought is not in our commercial interest.

Should SELC's request for reduced or waived fees be denied, SELC is prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves its right to appeal a fee waiver or reduction denial.

If you have any questions regarding this request, please feel free to contact me at 615-921-9460 or apassino@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,

A handwritten signature in blue ink that reads "Anne Passino". The signature is fluid and cursive, with the first name "Anne" and last name "Passino" clearly distinguishable.

Anne E. Passino
Staff Attorney